

**SC 83551**

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**IN THE  
SUPREME COURT OF MISSOURI**

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**PAUL TRAVIS,  
Plaintiff/Appellant**

**vs.**

**MEREDITH LYNNE STONE, et al.  
Defendants/Respondents**

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**Appeal from the Circuit Court of Johnson County, Missouri  
17th Judicial Circuit, CV498-599CC  
Hon. Joseph P. Dandurand, Judge**

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**SUBSTITUTE BRIEF OF RESPONDENTS  
LOWELL WALTER HULSE, JR. and APEX DIGITAL TV, INC.**

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction of this cause pursuant to Article V, Section 10, of the Constitution of Missouri and Supreme Court Rule 83.04.

## **STATEMENT OF FACTS**

Pursuant to Supreme Court Rule 84.04(f), respondents hereby supplement appellant's statement of the facts as follows:

Properly stated, the single issue on appeal in the present case is whether there has been a "clear showing" that the trial court abused its discretion in denying appellant's motion for a new trial, which was based on alleged juror misconduct<sup>1</sup>. Appellant contends that he was prejudiced because juror Violet Zink visited the scene of the traffic accident during trial. The trial court disagreed and found no evidence of prejudice.

At a post-trial hearing on appellant's motion, juror Zink testified that she has lived in Warrensburg, Missouri, the scene of this accident, all of her life. (Tr. 57). She drives through

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<sup>1</sup> Appellant concedes that the present appeal pertains to only one issue; however, appellant's description of that issue ("whether the trial court erred in finding that Plaintiff was not prejudiced by Juror Zink's misconduct") is not accurate because it does not acknowledge the "abuse of discretion" standard. (See appellant's substitute brief, p.21).

the accident scene “a hundred times a year”. (Tr. 57). Mrs. Zink testified that she did not use her visit to the accident scene to help her decide anything. (Tr. 57 and 58). Her visit to the scene did not sway her vote one way or the other; her verdict was based on the evidence. (Tr. 58-9).

Juror Zink was not the foreperson of the jury. (Tr. 59). She never mentioned to anyone on the jury that she had gone to the scene of the accident. (Tr. 58). When asked by the court whether she discussed her visit to the accident scene with any other juror at any time during the deliberations, she responded: “Absolutely not”. (Tr. 59).

The court gave no instruction to the jurors not to visit the accident scene, but would have done so if it had been asked. (Tr. 61). At the hearing on appellant’s post-trial motion the court found that Mrs. Zink’s visit to the accident scene constituted misconduct. (Tr. 61). The court took under advisement, and later rejected, appellant’s assertion that prejudice resulted from juror Zink’s actions.

**POINT RELIED ON**

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION FOR NEW TRIAL, BASED ON ALLEGED JUROR MISCONDUCT, BECAUSE THERE WAS NO EVIDENCE OF PREJUDICE TO APPELLANT AS A RESULT OF ANY SUCH MISCONDUCT.**

Mathis v. Jones Store Co., 952 S.W.2d 360 (Mo. App. W.D. 1997).

Rogers v. Steuermann, 552 S.W.2d 293 (Mo. App. W.D. 1977).

Yoon v. Consolidated Freightways, Inc., 726 S.W.2d 721 (Mo. banc 1987).

## ARGUMENT

**I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION FOR NEW TRIAL, BASED ON ALLEGED JUROR MISCONDUCT, BECAUSE THERE WAS NO EVIDENCE OF PREJUDICE TO APPELLANT AS A RESULT OF ANY SUCH MISCONDUCT.**

**(a) Even If Juror Zink’s Visit To The Accident Scene Constituted Juror Misconduct, There Was No Abuse Of Discretion In Denying Appellant’s Motion For New Trial Where There Was No Evidence Of Prejudice To Appellant.**

Issues relating to alleged juror misconduct are left to the sound discretion of the trial court and rulings on such matters will not be disturbed on appeal absent a “clear showing” of abuse of discretion.<sup>2</sup> Mathis v. Jones Store Co., 952 S.W.2d 360, 364 (Mo. App. W.D. 1997);

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<sup>2</sup> “Judicial discretion is abused when the trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” Mathis v. Jones Store Co., 952 S.W.2d 360, 365 (Mo. App. W.D. 1997), citing, Anglim v. Missouri Pacific RR Co., 832 S.W.2d 298, 303 (Mo. banc 1992).

see also, Rogers v. Steuermann, 552 S.W.2d 293, 295 (Mo. App. W.D. 1977) (appellate courts “must” defer to trial court’s finding regarding prejudicial effect of juror misconduct unless it “substantially appears” that the trial court erred and failed to exercise “sound discretion”).

In the present matter, even if it is assumed that juror Zink’s visit to the accident scene during trial was misconduct, the present appeal must fail because no prejudice resulted from any such misconduct. First, juror Zink testified that she is intimately familiar with the intersection where this accident occurred because she has lived in Warrensburg, Missouri all of her life and drives through the intersection in question “a hundred times a year”. (Tr. 57).

In addition, Mrs. Zink testified that her visit to the accident scene during trial did not help her “to decide anything”. (Tr. 57). Her visit to the scene did not sway her vote. (Tr. 59). Her verdict was based on the evidence. (Tr. 59). Also, Mrs. Zink made it abundantly clear that she did not discuss her visit to the accident scene with any of her fellow jurors at any time during the trial. (Tr. 59). It is also clear that Zink’s visit to the scene did not play any part in the deliberations of the jury. (Tr. 59). As a result, there is no evidence that juror Zink’s visit to the accident scene during trial resulted in any prejudice to appellant.

Moreover, the trial court hears the evidence concerning alleged juror misconduct and is, therefore, in the best position to determine the credibility and intent of the parties and to determine any prejudicial effect of the alleged misconduct. Mathis v. Jones Store Company, 552 S.W.2d at 364. In the final analysis, every case rests upon its own particular facts and a large discretion is rightly vested in the trial judge who sits as an intimate observer of the whole chain of events. Id.

In the present case, The Honorable Joseph Dandurand presided over the trial, heard the post-trial testimony of the juror in question, and reviewed the post-trial briefings submitted by the parties. At the conclusion of the post-trial hearing the Judge stated his belief that misconduct had occurred, but announced that he would independently evaluate the question of whether prejudice had resulted from that misconduct. (Tr. 61). Judge Dandurand subsequently denied appellant's motion for new trial, implicitly finding that no prejudice had occurred. In fact, there was ample evidence in the record to support Judge Dandurand's finding. As noted above, juror Zink testified that her visit to the accident scene during trial did not help her "to decide anything" and did not sway her vote. (Tr. 57 and 59). Her verdict was based on the evidence. (Tr. 59).

Therefore, the court properly rejected appellant's claim that prejudice had resulted from juror Zink's visit to the accident scene. Appellant has not demonstrated that the trial court abused its discretion in reaching that conclusion. Judge Dandurand was in the "best position" to determine whether prejudice had occurred. There is nothing about the Judge's ruling that appears "arbitrary", "unreasonable" or indicating a lack of "careful consideration". It simply cannot be said that Judge Dandurand's ruling is so unreasonable as to "shock the sense of justice". If reasonable persons can differ about the propriety of the trial court's action, it cannot be said that the trial court abused its discretion. Mathis v. Jones Store Co., 952 S.W.2d at 365. The most that appellant can say is that reasonable persons might disagree about the trial court's ruling; however, that disagreement falls well short of demonstrating that the trial court abused its discretion. As a result, the court's ruling must stand.

(2) Appellant Bears the Burden on Appeal and Has Not Made a “Clear Showing” of Abuse of Discretion.

First, the parties in the present matter each allege that the opposing party bears the burden on appeal. Appellant argues that a finding of juror misconduct creates a presumption of prejudice which shifts the burden to respondents to show that no prejudice resulted from such misconduct. (See appellant’s substitute brief, page 27). Appellant cites Middleton v. Kansas City Public Service Co., 152 S.W.2d 154 (Mo. 1941) in support of this proposition. Middleton is a 1941 decision of this Court which has never been cited for the proposition appellant relies on.<sup>3</sup>

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<sup>3</sup>In Kennedy v. Bi-State Development Agency, 668 S.W.2d 260, 262-3 (Mo. App. E.D. 1984) the Eastern District Court of Appeals stated, without citation to any authority, that the presence of juror misconduct shifts the burden of proof to the opposing party to

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show that no prejudice occurred. On the other hand, in Mathis v. Jones Store Co. 952 S.W.2d 360, 363 (Mo. App. W.D. 1997) the appellant specifically invited the Western District to find that prejudice should be presumed from juror misconduct. The Court declined to do so.

Respondents deny that Middleton expresses the standard that applies in the present case. However, even if appellant's reliance on Middleton is well founded, the presumption of prejudice and the corresponding shift in the burden of proof envisioned by Middleton pertain to the trial court's review of a motion for new trial, not an appellate court's review of the trial court's ruling. As noted above, the standard on appeal is whether the trial court abused its discretion. The appellant bears the burden on that issue and can prevail only upon a "clear showing" of abuse. That standard is not easily met. A juror's visit to the site giving rise to the litigation will not automatically call for a new trial. State ex rel. State Highway Commission of Missouri v. Lock, 643 S.W.2d 46, 50 (Mo. App. W.D. 1982). Even where there is evidence of juror misconduct, the trial court "must" find that such misconduct prejudiced a party before it may order a new trial. Yoon v. Consolidated Freightways, Inc., 726 S.W.2d 721, 723 (Mo. banc 1987). Because the evidentiary record in the present case supports Judge Dandurand's conclusion that no prejudice resulted from the juror's visit to the accident scene there is no abuse of discretion and the trial court's ruling must stand.

(3) Appellant's Reliance on *Middleton*, *Stotts* and *Douglass* is Misplaced.

Appellant claims that juror Zink's alleged misconduct in the present case is analogous to the juror misconduct in Stotts v. Meyer, 822 S.W.2d 887 (Mo. App. E.D. 1991) and Douglass v. Missouri Cafeteria, Inc., 532 S.W.2d 811 (Mo. App. E.D. 1975). (See appellant's substitute brief, p. 36). That claim is spurious. In both Stotts and Douglass, the jurors in question not only visited the accident scenes, they discussed their findings with other members

of the jury during deliberations. (In Stotts there was evidence that the jury changed its vote after the disclosure of extraneous evidence obtained by the juror who visited the accident scene.) In each instance the Eastern District found that prejudicial misconduct had occurred because the jurors visited the accident scenes and communicated information regarding those visits to other jurors.

The juror in the present case made it abundantly clear that she did not discuss her visit to the accident scene with any of her fellow jurors at any time during the trial. (Tr. 59). As a result, the holdings in Stotts and Douglas are distinguishable and are not controlling in the present case.

Appellant also claims that the juror misconduct in the present case is analogous to the juror misconduct in Middleton v. Kansas City Public Service Co., 152 S.W.2d 154 (Mo. 1941).

That claim is inaccurate. Middleton concerned a collision between a streetcar and an automobile. The juror in question visited seven used car lots during trial in an attempt to find a vehicle similar to the one involved in the collision at issue. Id. at 156. He found such a vehicle at the seventh car lot and made various measurements. Id. The juror also found a streetcar comparable to the one involved in the collision and made measurements of it. Id. In addition, the juror in question was the foreman of the jury.

Obviously, the juror in Middleton did not attempt to merely “refresh his memory” through his independent investigation. Indeed, this Court found that the juror’s conduct disclosed “an affirmative purpose to reject the evidence in the record and get information

outside the record”. Id. at 159. That conduct is substantially different from the conduct of juror Zink in the present case.

(4) Appellant Seeks to Impose an Impossible Burden of Proof on Respondents.

Having argued that prejudice should be presumed from the juror’s visit to the accident scene in this case, appellant then argues that the juror’s own testimony is not sufficient to overcome the presumption of prejudice. (See appellant’s substitute brief, p. 40). Appellant says that “little probative value” should be given to the juror’s testimony. (See appellant’s substitute brief, p. 41). However, that standard would make it impossible for respondents to ever rebut the presumption of prejudice.

In the present matter, the juror in question testified that she did not discuss her visit to the accident scene with any of her fellow jurors. (Tr. 58-9). Therefore, prejudice existed only if the thoughts or deliberations of the juror in question were influenced by her visit to the accident scene. The only person who could conceivably answer that question is the offending juror herself. But if the trial court disregarded the testimony of that juror, as appellant suggests, there is no way that these respondents could ever rebut the presumption that prejudice occurred. Respondents would be required to rebut a presumption but would be denied the only tools that would permit them to do so. Respondents would have the worst of both worlds: appellant would be allowed to use the juror’s testimony to establish misconduct (from which the court would presume prejudice) but respondents would not be permitted to use the juror’s testimony to dispel the presumption of prejudice.

It should be clear that appellant seeks to have it both ways with respect to juror Zink's testimony. It was appellant's attorney who called Mrs. Zink to testify at the post-trial hearing and it was appellant's attorney who questioned juror Zink in an attempt to establish juror misconduct. Having questioned Mrs. Zink, appellant now seeks to impeach that testimony by arguing that Zink was not competent to testify about whether she was influenced by her visit to the accident scene. (See appellant's substitute brief, p. 40-44). Appellant argues that he should be entitled to rely on juror Zink's factual testimony to establish juror misconduct but that the trial court should have rejected juror Zink's opinion testimony regarding the effect of that misconduct. (See appellant's substitute brief, p. 42). Appellant argues that Middleton supports this distinction and conclusion. Appellant misreads Middleton.

In Middleton the juror in question visited seven used car lots in his quest for independent information. He made separate measurements of an automobile found at one of those lots and of a streetcar at another location. After trial the juror signed an affidavit stating that the measurements he had made did not influence his verdict or change the result in the case. Id. at 156. Obviously, that affidavit was not credible and this Court held accordingly. However, Middleton does not stand for the broader proposition, suggested by appellant in the present case; namely, that a juror's post-trial factual testimony is to be accepted while the juror's opinion testimony should be rejected.

Furthermore, appellant's position on this topic would render meaningless the established case law which holds that the trial court is in the best position to determine the credibility of witnesses and any prejudicial effect of alleged juror misconduct. If the trial

court is instructed to give “little weight” to the testimony of the offending juror regarding the potentially prejudicial effect of the juror’s misconduct, there is no witness credibility for the trial court to assess. The trial court would be in no better position than the appellate court to determine the prejudicial effect of any such misconduct.

Appellant’s position on this topic also is inconsistent with other established case law. It is not an abuse of discretion to deny a motion for new trial where there is no evidence that the juror obtained any “new, different, or conflicting evidence” by visiting the accident scene. Rogers v. Steuermann, 552 S.W.2d 293 (Mo. App. W.D. 1977). In the present matter the offending juror is the only person who could conceivably answer the question of whether any new, different or conflicting evidence was obtained as a result of her visit to the scene of this accident. If the testimony of that juror is disregarded, as appellant suggests, the question remains unanswered and is unanswerable.

Also, under the standard proposed by appellant -- that prejudice is to be presumed from juror misconduct and that little probative value should be placed on the juror’s testimony to rebut that presumption -- virtually every visit by a juror to an accident scene during trial, no matter how innocent, would result in a new trial. The present case deals with a juror’s deliberate visit to the accident scene during trial; however, appellant’s position has broader implications. Under appellant’s standard there could be no such thing as harmless juror misconduct, at least with respect to a juror’s visit to the scene of an accident, even if that visit was not deliberate. Every visit by a juror to an accident scene would create a presumption of prejudice which could not be overcome by the juror’s own testimony. Appellant

attempts to avoid this result by drawing a distinction between “innocent” and “purposeful” visits to an accident scene during trial. (See appellant’s substitute brief, p. 32-3). Appellant concludes that no prejudice could result from “innocent” visits. First, appellant cites no case law in support of this distinction or its implications. More importantly, if little probative value is to be given to the juror’s post-trial testimony, as appellant suggests, there is no way of knowing which visits are “innocent” and which are “purposeful”. The trial court would be required to order a new trial any time a juror visited the accident scene.

Finally, in the present case the trial court did not give any instruction to the jurors not to visit the scene of this traffic accident. (Tr. 61). As a result, the juror in question had no way of knowing that her visit to the scene during trial was in any way improper. (Indeed, she testified that she went to the scene because she wanted to make sure that she “did the right thing”.) (Tr. 58). She had no way of knowing that her visit to the accident scene might constitute misconduct or that it might result in a new trial. Under these facts, it is patently unfair to penalize these respondents for the conduct of a juror who did not even know that her actions might be improper.<sup>4</sup>

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<sup>4</sup>The position of the United States Supreme Court is pertinent to this topic. In McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984), a case of alleged juror misconduct based on juror non-disclosure during voir dire, the Supreme Court, in denying a new trial, stated: “This Court has long held that a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials. ...We

- (5) There Was No Abuse of Discretion Because the Juror In Question Did Not Obtain Any “New, Different or Conflicting Evidence”.

It is not an abuse of discretion to deny a motion for new trial where there was no evidence that a juror obtained any “new, different or conflicting evidence” by visiting an accident scene. Rogers v. Steuermann, 552 S.W.2d 293, 295 (Mo. App. W.D. 1997) (citing, Middleton v. Kansas City Public Service Co. 152 S.W. 2d 154 (Mo. 1941)); see also, Tobb v. Menorah Medical Center, 825 S.W.2d 638, 641 (Mo. App. W.D. 1992) (new trial not warranted unless information obtained by juror is conflicting with or different from the evidence presented at trial).

As noted above, juror Zink testified that she was intimately familiar with the intersection where this accident occurred because she has lived in Warrensburg, Missouri all of her life and drives through the intersection in question “a hundred times a year”. (Tr. 57). She went to the scene to “refresh [her] memory”. (Tr. 57). A person “refreshes” her memory by remembering what she already knew, not by learning something new. Juror Zink specifically testified that she was not trying to gather her own evidence. (Tr. 59). She said that she was not

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have come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered ‘citadels of technicality’.”

trying “to be an attorney”; she just wanted to make sure that she made the right decision. (Tr. 59). She did not obtain any information that was different from or conflicting with the evidence presented at trial.

In this context appellant argues that the Rogers decision is not applicable to the present case. (See appellant’s substitute brief, p. 39). Appellant fails to explain that contention. Clearly Rogers has not been overruled. In reality, the case is on point and should be followed. *See also, Tobb v. Menorah Medical Center*, 825 S.W.2d 638, 641 (Mo. App. W.D. 1992) (new trial not warranted unless information obtained by juror is conflicting with or different from the evidence presented at trial).

(6) Respondents Properly Stated Their Objection to the Post-Trial Testimony of the Offending Juror.

In his motion for a new trial, appellant raised three points, only one of which has been addressed on appeal; namely, the allegation that one of the jurors improperly visited the accident scene during trial. In their suggestions in opposition to appellant’s post-trial motion, these respondents stated that appellant’s assertion of juror misconduct was nothing more than an improper attempt to impeach the jury’s verdict. (L.F. 52).

Appellant argues that there was “absolutely no objection” to the testimony of juror Zink. (See appellant’s substitute brief, p. 23). That allegation is simply incorrect. Respondents’ objection appeared in their suggestions in opposition to appellant’s post-trial motion. Those suggestions are incorporated in the Legal File which, under Supreme Court

Rule 81.12, constitutes part of the record on appeal in the present matter. Respondents' objection to the juror's post-trial testimony was, therefore, before the court.

Appellant argues that this situation is analogous to that of a motion in limine because that motion, in and of itself, does not preserve an issue for appellate review. (See appellant's substitute brief, p. 24). Appellant cites no case law in support of this analogy and, in fact, the two situations are legally distinguishable. The purpose of a motion in limine is to point out to the court and to opposing counsel anticipated evidence which may be objectionable. Robbins v. Jewish Hospital of St. Louis, 663 S.W.2d 341, 348 (Mo. App. E.D. 1983). By comparison, respondents' objection to the testimony of juror Zink was an attempt to prevent impeachment of the jury's verdict in this case. It is well settled that a juror may not be allowed to impeach the jury's verdict because of the misconduct of a juror. Bailey v. Hilleman, 566 S.W.2d 504, 506 (Mo. App. E.D. 1978), Gantz v. Leibovich, 569 S.W.2d 373, 374 (Mo. App. E.D. 1978). The affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the purpose of impeaching the verdict of a jury of which the juror was a member. Neighbors v. Wolfson, 926 S.W.2d 35, 37 (Mo. App. E.D. 1996).<sup>5</sup>

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<sup>5</sup>It is worth noting that the rules of the Circuit Court for the 22<sup>nd</sup> Judicial Circuit (City of St. Louis) prohibit attorneys and parties and their representatives from having post-trial contact with jurors absent permission from the trial court. *See* Local Rule 53.3. Had the present matter been tried in the City of St. Louis, or under the rules of the 22<sup>nd</sup> Judicial Circuit, it is unlikely that the issue of juror misconduct would have been raised, thereby

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producing an entirely different result.

## **CONCLUSION**

In the present case appellant has failed to make a “clear showing” that the trial court abused its discretion in denying appellant’s motion for new trial, which alleged that prejudicial misconduct occurred when juror Violet Zink visited the accident scene during trial. In fact, there was no abuse of discretion because the evidentiary record in this case contains substantial support for the trial court’s conclusion that no prejudice resulted from any such juror misconduct. That record establishes that juror Zink was intimately familiar with the accident scene, that she did not use her visit to the accident scene to help her decide anything, that her visit to the scene did not sway her vote, and that her verdict was based on the evidence. In addition, juror Zink did not tell any of her fellow jurors of the visit to the scene; her visit to the scene did not play any part in her deliberations or vote.

The trial court heard the evidence concerning alleged juror misconduct and is in the best position to determine any prejudicial effect. It cannot be said that the trial court’s ruling is “clearly against the logic of the circumstances” or that it is “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration”. The most that appellant can say is that reasonable persons might disagree about the trial court’s ruling; however, under the controlling case law, that disagreement falls well short of demonstrating that the trial court abused its discretion. As a result, the court’s ruling must be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of July, 2001, two copies of Respondents' Substitute Brief, together with a floppy diskette, were served via First Class U.S. Mail, postage prepaid, upon the following counsel:

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## **CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1**

Undersigned counsel for Respondents hereby certifies that this Substitute Brief complies with the type-volume limitation specified in Special Rule No. 1(b). This brief was prepared using Corel WordPerfect Version 9. The word count for this brief, according to the word processing systems, is 5,062 words. Undersigned counsel also certifies that the floppy disk filed with this Substitute Brief, pursuant to Special Rule No. 1(f), has been scanned for viruses with Norton virus-scanning software and is virus-free.

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